THE RECALL OF JUDGES AND OF JUDICIAL DECISIONS.

WE live in an age when courts are attacked, judges condemned for obeying the constitution, and representative government is ridiculed and sought to be destroyed. The wish of socialists has become the political ethics of near-socialists and many other citizens. It has become popular to rail against the authority of courts; to demand that courts shall no longer be conservators of constitutional guarantees; that judges shall serve under the fear of recall; and representative government shall give way to an absolute democracy. Has political wisdom waited for the year 1912, only to offer us socialism and the worn out and self destructive democracy of ancient Athens?

The recall of judges is advocated by socialists of the worst type and for a purpose inimical to justice. The recall of judicial decisions is advocated also by socialists, and in effect has been advocated by them for many years, under their attack upon what they term the "judicial veto," and is inimical to every guarantee in the bills of rights of every constitution in the Union.

Representative government has long been condemned by socialists, and they are bold enough to say, they are opposed to it, for the reason that it stands in the way of the success of socialism. Socialism can never realize its threatened propaganda, while the bill of rights has force and life. This force and life, however, can be made to depart, whenever the constitution can be nullified by legislation placed beyond constitutional restraint. The socialist plan is to nullify the bill of rights by the use of the recall, the initiative, the referendum, and the recall of judicial decisions. Until these things are possible, the socialists want the preferential ballot and proportional representation, and they want these for a purpose, and that purpose is to get all they can under representative government, and steadily work for the breaking down of all existing systems standing between them and the ultimate success of an absolute democracy.

I do not wish to be understood as saying, that none but socialists want or advocate the things mentioned, and want it understood when I speak of socialists that I have in mind the anti-law-and-order type. I am not opposed to reform, but real reform is something beyond a name and an effort in aid of destroying safe and sane government. I am opposed to the recall of judges and of judicial decisions. I am aware that, as soon as a judge dares to raise his voice against the recall of judges, he is charged with being afraid of his tenure of

[1]An address delivered on December 27, 1912, before the annual meeting of the Association of Judges of Michigan.

office, and fear of this taunt, has up to date kept too many silent. The fear of being unable to retain my office, shall not silence my tongue, for I have as good a right to defend safe and sane provisions of government, as any man has to assail the same, and if what I may say is not in line with popularity, then, so long as I believe I am right, I will get comfort from within, rather than plaudits from the thoughtless.

Let a man but raise his voice in support of the preservation of the judicial system, which has maintained the integrity of the constitution and safeguarded personal liberty for a century and a quarter, and he is called a "reactionary," and so branded, is looked upon by many with suspicion and as one opposed to the true principles of liberty. Every demagogue since Homer pictured their character, has claimed to be the apostle of the people, and too often they have made the people believe it, and have hurled catch words at all opposition and led the people to look upon such words as real things. Mirabeau understood the power of such revolutionary catch words, for he said: "We must never forget that words are things." And Mirabeau helped to delude the people of France into adopting such a government that Napoleon was its logical conclusion.

It has always been a maxim with disorganizers, to treat words as things, and by catch words inflame the passions of the unthinking and silence by epithets those not to be won by flattery. They endeavor to stifle opposition by causing their opponents to be looked upon with contempt. Contempt is not hard to be won, if it is wooed with inflammatory words, and then, if wedded to a light-headed desire for change, the coupling can do much harm, under the delusion that it is doing much good.

Why should an American citizen be ashamed of representative government, and of our judicial system, and why should one remain silent while the effort is on to make the court a mere political reflector of the majority will in an absolute democracy?

The recall of judicial decisions is one of the boldest pieces of political buncombe, coupled with destructive possibilities, with which the politicians have ever ventured to make fools of the people. Politicians, having gleaned other fields of demagogy, have now turned their attention to the political exploitation of the courts, in the hope they can lead the people into the belief their services will be needed in the political field of the new democracy, wherein the court is to be the mere representative of popular opinion. No mere elected officer has ever had the power held by demagogues in the democracies of the past.

We have been told of decisions, that ought, it is claimed, to be set aside, and we have noticed that, like the patent medicine advertisements, the remarkable cases mentioned are not in our vicinity, and we have been loudly warned against permitting the court to proceed with the power it has exercised since the foundation of the government, and we have looked about, to discover if possible, "why this howl," and have been unable to find any reason whatever for alarm, in Michigan decisions.

Suppose some court has rendered a decision that has not met popular fancy—what of it? Is popularity to be the test of what the laws is? If so, why not hold a town meeting instead of a term of court? That was done in the ancient democracies and in the trial by the hundred in early England.

If the decision of any court has not met the fancy of the majority, there is a sane way, if the decision involved a constitutional question, to take care of the matter and have what the majority may want; an orderly, deliberative method of submission to the people, but this affords no opportunity for the politician to assail the court and cull popularity for himself.

One purpose of the recall of judges is to place the judge in a political position, where popular passion may wreak vengeance upon him, in case he refuses to accede to popular demand; to make him the target of popular resentment or the recipient of popular acclamation, depending upon whether the administration of the law, displease or pleases popular fancy. It will permit the judge to be made the sacrifice at the polls to the dislike entertained for some law he has fearlessly administered.

Opposition to law and order can be given vent through this form of political machinery, and a judge will but add fuel to the fire if he attempts to justify under a law hated in his community. It is the duty of the judge to obey the law and to administer it in cases coming before him, but the recall will make him occupy a position, where his tenure of office may depend upon popular approval of the law. If the law administered is not liked, an angry people is not likely to separate the judge from the law in giving exercise to resentment, and as time goes on, this will be more and more the case, for have we not already heard public officials roundly abused for obeying a provision of the constitution a school boy could not misapprehend. Will you expect less resentment against the law and officials obeying the law, with the recall, than you are getting now, without the recall? Will you expect that those who are now condemned for obeying the constitution will not be condemned and recalled for obeying the constitution?

An oath of office to support the constitution will bring judges into direct conflict with those who want the constitution ignored, and with those who advocate that a written constitution is only authority when in accord with the daily wish of the majority. This opposition to the constitution has not come from the ignorant alone, but men of high standing have contended that the people have been deprived of a right by an official adherence to a provision of the constitution, and thousands of men in this state believe it.

What is the use of having any constitution at all, if it is only to speak at the will of the majority, and then only as the majority dictates and regardless of the instrument itself? Why not let the majority do it all, and live under the simple pastoral pandect, "Whatever is right is constitutional," supplemented by its companion piece of despotism and nonsense, "might makes right?" This of course would lead to anarchy and pandemonium, but what of that, so long as it would be the anarchy and pandemonium of the majority. Under this resurrected dogma of the dead and buried democracies of the past, may not the majority do as it wills? If not, what power will stop the majority? If the courts are to be mere political agencies for reflecting the popular will, certainly it will not be expected that this agency of the majority will stop the majority from doing as it wills.

The idea is to make the court subservient to the popular will regardless of the constitution, and as such become the mere machine of the political will of the majority, to automatically sense such will and serviently carry it out. A judge to be popular under the law of recall, may have to have an adaptable conscience. I know of no judge who will in the least swerve from the line of duty, but does not the recall have for one of its purposes, the end of compelling the judge to adapt his decisions to meet popular demand.

Lord Bacon once said:

> "A popular judge is a deformed thing; plaudits are fitter for prayers than magistrates.
>
> "Do good to the people, love them and give them justice; but let it be as the Psalm saith, 'nihil inde expectantes'; looking for nothing, neither praise nor profit."

The recall of judges places the judge amidst the distracting clamor of factional disputation, and warns him to have in mind his precarious tenure of the office, and yet the very people who want the power to make good a threat to remove, insist that under that kind of tenure, the independence of the judge will raise him above the threat, and righteousness will be in all of his decisions. If righteousness

remains it will be in spite of the recall, instead of because of the recall.

But, we are told, majorities will never be induced by designing demagogues, to overstep the line of duty of good citizenship and ask for the recall of a judge for performing his duty. Some one has well said:—

> "He who, in declamatory appeals to the people, urges that no such crisis can possibly occur when the majority shall be induced by unprincipled demagogues to overstep the legal limits, is himself a demagogue and a selfish flatterer, and ought never to be elevated to an office which was instituted to guard the rights of all the people."

Some late books on socialism and near-socialism, advocate the scheme of making the courts so democratic and political that they will reflect the will of the majority from day to day regardless of the constitution.

One late author says it will not be necessary to amend the constitution at all, to have done what the majority may want done, provided the courts are made to respond to the will of the majority. It is with shame that an American citizen must admit the truth of this statement, for, if you can compel the courts to violate the constitution, then (with the initiative) there is no other power left in this country to save any constitutional provision from being ignored, violated and contemned by the majority at will.

It is safe to say that there never will be a judiciary in this country so lost to honor as to violate the constitution. *The recall of judicial decisions comes into play at the point where you cannot get the court to depart from the constitution.*

The recall of judicial decisions, is a political heresy, absolutely destructive of the constitution, subversive of civil liberty, damned by history, and a menace to the very existence of government. It would destroy the check of the court against the usurpation of fundamental rights, and place the power of a political majority above all law and all administration thereof.

The recall of judicial decisions goes so far toward the destruction of the law and its protection and enforcement, that the recall of judges is in comparison but a puling infant to this giant of destruction. It may make but little difference whether one man or another, sits upon the bench, so long as we know what the law is.

The recall of judicial decisions does not remove the judge from the office, for that might accomplish nothing, as another man with a due sense of the obligation of the office would probably be elected, and he would find the law unchanged by the removal of his prede-

cessor, and have to take an oath to support the constitution, but the recall of judicial decisions removes the office from the judge; "it removes the office and leaves the man; it leaves the man in the office but takes from the office the power; it does not throw the judge overboard, for that is an unnecessary exertion; it sinks the boat under him."

The recall of judicial decisions is but a rechristening of the old dogma known as the judicial competency of the people. In the fifth century before Christ, by Solon's constitution, the whole management of affairs was placed in the hands of the people for direct action.

> "It was their (the people's) prerogative to receive appeals from the courts of justice; to abrogate old laws, and enact new; to make what alterations in the state they judged convenient; and in short, all matters, whether public or private, foreign or domestic, civil, military, or religious, were determined by them."

The recall of a judicial decision is the appeal of the question, from the decision of the court, to the decision of the electors at the polls, where, if the majority vote is against the decision, it is overturned. History has told us how it worked out in Ancient Greece.

> "The final assertion of the exclusive judicial competence of the people was the result of gradual growth.
>
> "It sprang from the practice of hearing appeals from the magistrate, who passed in consequence from an independent court into a court of first instance, and finally into an official mainly engaged in conducting the preliminaries of a trial."

In the Roman Republic they had the recall of decisions:

> "The judicature of Rome provoked collisions between the magistrates and the people. At Rome, citizens accused of crimes were tried by the magistrates; but if condemned, they had a right of appeal to the people; and it was not until the sentence had been affirmed by three public assemblies, that they could suffer the punishment due to their crimes."

Aristotle wrote:

> "Another form of democracy is where, every one, provided he is a citizen has a share in the government, but the government is in the law. * * * * Another is the same but allows the people and not the law to be supreme; and this takes place when everything is determined by a majority of votes, and not by law; a thing which happens by reason of the demagogues. * * * For where a democracy is governed by stated

> laws, there is no room for a demagogue, * * * * but where the power is not vested in the laws, there demagogues abound."

Did George Washington anticipate the dangerous and socialistic doctrine of the recall of judicial decisions when he gave the following warning in his Farewell Address:

> "The basis of our political systems is the right of the people to make and alter their constitutions of government—But the constitution which at any time exists, 'till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all. Toward the preservation of your government, and the permanency of your present happy state, it is requisite, not only that you speedily discountenance irregular oppositions to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles however specious the pretexts. One method of assault may be to effect in the forms of the constitution alterations which will impair the energy of the system, and thus to undermine what cannot be directly overthrown."

The evil of making judges responsive to the will of the majority was pointed out by a writer of just one hundred years ago. He said:

> "In popular governments, where parties are apt to carry their animosities to great lengths, the judiciary ought to be placed on a firm basis, and kept above the reach of popular enthusiasm and resentment. In a community where the judiciary power is dependent on the will of the people, it is easy to suppose that the judges will be naturally tinctured with the wishes and passions of a majority of their constituents, at whose mercy they are placed; and hence the decisions of judicial tribunals will be deeply colored with the prevailing dispositions of the times. Whenever this becomes the case in any republic, it may be said that the rights of the minority, under that government, are in a precarious situation."

Liberty is what we wish to enjoy and perpetuate. Not that enthusiastic phrensy of emotionalism which overleaps sensible restraint and overrides law and order, but that sober and thoughtful action which recognizes common rights and which protects all mankind.

The purpose of the recall of judges is to un-nerve the judges, and if it succeeds, there will be further aggression, for political purposes. A nerveless policy invites aggression and the end that will follow the smothering of the judicial independence can be seen by anyone at all familiar with history.

The recall is but the beginning of the movement; note how the re-

call of judicial decisions has been taken up and amplified by others in their advocacy of it, since it was first mentioned a few months ago. I am aware of the fact that some judges are in favor of the recall of judges, and I am also aware of the fact that in the time of Charles II, there were judges obsequious enough to represent to the king, upon the matter of making their salaries independent of his power, that it was not fit that judges should be out of all dependence on the king.

John Quincy Adams was right when he said:

> "Submission never yet set boundaries to encroachments."

As early as 1805, in the state of Pennsylvania, the present judicial system was assailed, and it was then avowed as their purpose, by those calling themselves patriots, to make the judiciary dependent and the popular branch supreme over all.

A writer in that year said:

> "There are men who prefer the chains of an equal to the equality of the constitution. Those who still borrow confidence from their hopes, and believe nothing which requires exertion, must continue in their slumbers, till exertions are useless. They will perceive the mischief when it has happened, and excuse their indolence, by expressions of idle amazement. The timid and the wary, who fear to act, lest they should be acted upon, who hope to obtain favor for their neutrality will find that the evils of anarchy will fall indiscriminately like the tornado which tears the oak of a hundred years from its foundations, and despoils the humblest flower of a day."

The time has gone by for treating these doctrines with apathy; those who advocate them are aggressive, and every thinking citizen should inform himself and line up with those who believe in an independent judiciary and constitutional integrity.

The recall of judicial decisions will bring the courts into collision with the majority; and this end is intended by some of its advocates, who really wish to see the day when the court will be compelled to defer to the will of the majority in a direct action taken by the majority against the courts.

A late writer openly says:

> "If the will of the majority is to prevail the courts must be deprived of the power which they now have to declare laws null and void. * * * * The democratic movement will either deprive the judicial branch of the government of its political powers or subject it to the same degree of popular

> control applied to other political organs. In any democratic community the final interpreter of the constitution must be the majority. With the evolution of complete popular government then, the judicial veto must disappear, or the court become a democratic body."

This author claims that this is a government of minority domination and with this mistake as his starting point he proceeds with his attack upon the courts. I take it from his book that his court, under his democracy, will be no more than any representative body, in its relation to the majority. He seems to consider constitutional protection, and guarantees against usurpation, confiscation and tyranny, as mere minority domination, and evidently has never heard that nearly every state constitution was adopted by "the majority."

It is such writings, that lead one to say, the recall of judges and of judicial decisions will mean, that judges in that day will have to have "understanding in the times, to know what Israel ought to do," for, if they fail in gauging popular sentiment, then they may be recalled and their decisions annulled.

The very heart of this movement to cripple the judiciary is the desire to remove constitutional restraint; to nullify the constitution whenever it interferes with the desire of a temporary majority, and to be able to do this without any amendment of the constitution. Under the new democracy the constitution will have to bend to the will of the majority, and be construed by the court to meet that will, and the court will be such a democratic organ that it will speak only as the majority permits.

For thirty-five years the Socialist Labor Party has advocated the recall of judges. In 1877, this party was organized and in its platform it declared:

> "Every public officer shall be at all times subject to prompt recall by the election of a successor."

This convention was held just after Bismarck had driven many socialists out of Germany. This same convention, dictating this doctrine to the American people, felt called upon to adopt a resolution, recommending each section to send to future conventions of the party, delegates familiar with the English tongue.

Carlyle's spiteful epigram, that the United States is but "an anarchy plus a policeman" may prove untrue if we slip into an absolute democracy and recall the policeman.

We are nearer anarchy in this country than many realize. Dynamite has supplemented threats in many instances, and buildings have been blown up and lives destroyed, and some terrible revelations

have been presented to us in the last few months. Is it not high time to awaken and shake off the lethargy of personal or political cowardice and say the courts shall be preserved in their full integrity?

Theodore Roosevelt in the Review of Reviews for September 1896, had the following to say about those who at that time attacked the Supreme Court and about those who objected to injunctions:

> "The men who object to what they style 'government by injunction' are, as regards the essential principles of government, in hearty sympathy with their remote skin-clad ancestors who lived in caves, fought one another with stone-headed axes, and ate the mammoth and woolly rhinoceros. They are interesting as representing a geological survival, but they are dangerous whenever there is the least chance of their making the principles of this ages-buried past living factors in our present life. It is not a nice thing to wish to pay one's debts in coins worth fifty cents on the dollar, but it is a much less nice thing to wish to plunge one's country into anarchy by providing that the law shall only protect the lawless and frown scornfully on the law-abiding. There is a good deal of mushy sentiment in the world, and there are always a certain number of people whose minds are weak and whose emotions are strong and who effervesce with sympathy toward any man who does wrong, and with indignation against any man who chastises the criminal for having done wrong. These emotionalists, moreover, are always reinforced by that large body of men who themselves wish to do wrong, and who are not sentimental at all, but, on the contrary, very practical."

Yet in 1912, in his personally supervised platform, is this plank:

> "We believe that the issuance of injunctions in cases arising out of labor disputes should be prohibited when such injunctions would not apply when no labor disputes existed."

Now listen to what he had to say in 1896, about those who attacked the court:

> "Furthermore, the Chicago convention attacked the Supreme Court. Again this represents a species of atavism—that is, of recurrence to the ways of thought of remote barbarian ancestors. Savages do not like an independent and upright judiciary. They want the judge to decide their way, and if he does not, they want to behead him. The Populists experience much the same emotions when they realize that the judiciary stands between them and plunder.

Mr. Roosevelt wrote a life of Gouverneur Morris, in which he said of Morris:

> "On the judiciary his views were also sound. He upheld the power of the judges, and maintained that they should have absolute decision as to the constitutionality of any law. By this means he hoped to provide against the encroachments of the popular branch of the government, the one from which danger was to be feared, as 'virtuous citizens will often act as legislators in a way of which they would, as private citizens be ashamed!"

And again in another part of the work he praised Morris in the following language:

> "He denounced, with a fierce scorn that they richly merit, the despicable demagogues and witless fools who teach that in all cases the voice of the majority must be implicitly obeyed, and that public men have only to carry out its will and thus ' acknowledge themselves the willing instruments of folly and vice. They declare that to please the people they will, regardless alike of what conscience may dictate or reason approve, make the profligate sacrifice of public right on the altar of private interest. What more can be asked by the sternest tyrant of the most despicable slave? Creatures of this sort are the tools which usurpers employ in building despotism.' Sounder and truer maxims never were uttered."

Yet, in the year 1912, we find Theodore Roosevelt saying things about the courts and advocating the recall of judicial decisions.

There is nothing new in this doctrine of the supreme judicial competency of the people, nor in any of the arguments lately advanced by its twentieth century advocates. The matter was fully discussed in this country sixty-nine years ago. I now quote from an article in the North American Review for October 1843:—

> "It may seem superfluous to argue in defence of that constitution of the courts of law, which has been so long approved by the experience both of England and America, and by the suffrage of nearly every political or judicial writer of any note. But the advantages resulting from it are so quiet and perennial, that they may easily escape the attention; and in a free country, the mania of a political innovation is so great, that without constant watchfulness, there is serious danger lest the most important institutions of society should be tampered with, till their influence is weakened or their efficiency

destroyed. A theory, under a specious name, may be allowed to supplant one of those time-honored establishments, which have ever afforded the best protection to the rights of the individual, and to the highest interests of the commonwealth. There are ominous signs in this country at the present day, which lead to some apprehension of such a fatal result. The judiciary is attacked in some of the States, not only by diminishing the salaries of the judges, where it is possible, but by doubts openly expressed whether any institution ought to exist, which is beyond the popular control. The opinion is plainly avowed, that the will of the people, for the time being, ought to be the only law, and that all restraints upon it, of whatever nature should be done away with. So long as such opinions and doubts were confined to the electioneering harangues of a few demagogues, or the columns of a few worthless newspapers, they could not effect much injury, and did not deserve serious notice. But when they are found embodied in official documents, when the governor of one of the 'old thirteen states' gives them place in his annual message to the legislature, it behooves the friends of free government and of the reputation of the country to be on the alert, and to arrest the evil, if it be possible, ere it is too late. We know not that this question has ever been agitated between the great political parties, which divide the country. Probably it has not been, and we fervently hope that it never may be. The independence of the judiciary is no subject for the common strife of faction and interest—no topic to be debated in the heat of contest—no material to be hammered out into political capital.

The year 1912, however, has found this very matter being "hammered out into political capital" by socialists and by one to whom everything is grist for his political mill. It was upon the banners at the late Quixotic battle of Armageddon and heralded as one of the revelations of the new "John."

But to return to the article from which I was quoting:

> "Let it once be fully understood, that an unpopular decision of the courts will be followed by a prompt dismissal of the judges, and the legislature may as well abrogate the whole system of laws and judicial tribunals, and individuals bring their disputes with each other into a town meeting for arbitrament, and alleged criminals arraigned at the bar of a popular assembly for trial. If the ultimate decision of law suits and criminal trials, and doubts respecting the interpretation of the con-

> stitution, is to depend on a popular vote, let that vote be given directly and immediately on the subject in hand, and the whole cumbrous machinery of the courts, which now stands between it and its object, be done away. There is a specious argument for destroying the independence of the judiciary * * * * frequently urged in the newspaper paragraphs and electioneering harangues, because it is calculated to make an impression on the unthinking. It is founded on the doctrine that, in this country, the will of the people is, and ought to be, supreme in every respect, and no institution should be allowed to exist, which is independent of their authority. It is urged, that all laws emanate from the people, and therefore should be referred for interpretation to the power which enacted them, * * * and that a denial of this right is a virtual impeachment of the constitution and the government under which we live. It is said, that the will of the people is usually made known only at stated times, and under certain forms, * * * but these forms and seasons are adopted only for convenience, and the same power which required the observation of them may dispense with it; so that the popular will, however promulgated, shall form, for the time being the supreme law, and the supreme exposition of the law.

This statement of the matter, as it was presented in 1843, reminds one of the very arguments presented this year in support of the recall of judicial decisions. Nothing came of the agitation fought out before the modern champions of the same were born, and some people may be surprised to learn that the doctrine was not born of a certain mind in the year 1912.

But let us return to the article and see what reply was made to those who were then so solicitous that the people, and not the courts, construe the constitution. The author said:

> "This is all sophistry, and sophistry so gross, that one is almost ashamed to argue against it. Now the founders of our present frame of government, whatever may have been their intentions with respect to the amount of power to be lodged directly in the hands of the people, certainly did not contemplate the establishment of a republic or a democracy, which should exist without any legal enactments whatever. * * * Adopt then, the most comprehensive and unlimited theory respecting the sovereignty of the people; say that they may frame what enactments they like on all manner of subjects, or may even annul all existing statutes, and live without law for all time to come, Still their power relates only to the pres-

ent and the future. The past is fixed and irrevocable. The sovereign may enact or abrogate what rules it pleases to govern coming events and the future conduct of men; but it cannot annul the rights, the contracts, and the expectations which have grown up under the laws that did exist. The business of the judiciary is to determine the rights and duties of individuals in conformity with previously existing laws. It does not, and it cannot, interfere with or limit the sovereignty of the people, because it neither claims nor exercises any portion of the law making power. It deals only with the past; it makes no laws, but only enforces those already made for it by another department of the government. An uncertain and shifting exposition of legal requisitions and commands is as bad as the absence of all law; it destroys confidence between man and man; it annihilates all trust in the future; * * * it has been the characteristic feature of the most oppressive and tyrannical governments of which there is any record in history. To ascertain what the law is, and to apply it to the case in hand, is the high function of the courts. Public opinion cannot aid them in the task, for it is not within the province of Omnipotence to recall the past, or to alter one jot of the eternal law of justice. The clamors of the multitude must be unheeded, for the judges are listening to a voice as awful as that which proclaimed the law in thunder from the top of Mount Sinai."

It has often been claimed, that Chief Justice Marshall was the first judge, in this or any other country, to hold the courts have power to declare an act of a legislative body unconstitutional, and that Marshall's being a Federalist, and therefore opposed to democracy, accounts for his assuming the power. Justice Marshall was not the first judge to so decide in this country. Justice Marshall was appointed by President John Adams in 1801, and the first case in which he had to deal with a constitutional question involving the inquiry as to the power and duty of the court to set aside an act of Congress because of its repugnance to the federal constitution was that of Marbury v. Madison, in 1803.

In 1786, and before the Constitution of the United States was even framed, the Superior Court of Rhode Island set aside an act of the General Assembly as unconstitutional. In 1786, there was a paper money party in Rhode Island and at the general election that year its triumph was complete. The Assembly created a paper money bank of one hundred thousand pounds authorized issue. The depreciation of the new paper bills commenced with their issue. To sustain them

if possible, the Assembly by a kind of forcing act, subjected any person who should refuse to receive bills on the same terms as specie, or in any way discourage their circulation, to a penalty of one hundred pounds, and the loss of the rights of a freeman. The result of the forcing act was a complete stagnation of business. Merchants discontinued their dealings and traders closed their shops.

On the 22nd day of August that year the General Assembly specially convened and passed an additional forcing act in favor of the paper money. This act suspended the usual forms of justice in regard to the offenders against the bank law, by requiring an immediate trial, within three days after complaint entered, without a jury, and before a court of which three judges should form a quorum, whose decision should be final, and whose judgment should be instantly complied with on penalty of imprisonment. This act was carried by a large majority in the Assembly and a protest against it as a violation of every principle of moral and civil right, of the charter, of the articles of confederation, of treaty obligations, and of every idea of honor or honesty entertained among men, was not allowed to appear upon the records.

The forcing acts speedily provoked litigation to test their validity and constitutionality. "John Trevett, of Newport, entered a complaint before Paul Mumford, chief justice of the Superior Court, against John Weeden, a butcher, of the same place, for refusing to receive paper money at par in payment for meat. The excitement was great throughout the state and a great concourse of spectators was present at the trial which took place before a full bench. The next morning Judge Howell delivered the opinion of the court, declaring the acts to be unconstitutional and void and dismissed the complaint against Weeden." Immediately there arose the same cry of "judicial veto" that we have heard cried so lustily lately, and the Assembly at once undertook to vindicate its acts and authority by calling the judges to account.

A special session of the Assembly was convened at Newport on October 2, 1786, and their first business was to summon the judges before them, "to assign reasons and grounds" of the late decision. The Assembly deemed itself omnipotent and could not tolerate any interference with its power to do as it pleased. The summons to the judges shows that it was then understood the decision of the court would act as a check upon the Assembly in the future.

The summons is an interesting piece of history and I therefore give it in full:

> "Whereas it appears that the Honorable, the Justices of the Superior Court of Judicature, Court of Assize, &c., at the

last September term of the said court, in the County of Newport, have by a judgment of the said court, declared and adjudged an Act of the Supreme Legislature of this State to be unconstitutional, and so absolutely void. And whereas it is suggested that the aforesaid judgment is unprecedented in this State, and may tend to abolish the Legislative Authority thereof, it is therefore voted and resolved, that all the Justices of the said court be forthwith cited by the Sheriffs of the respective counties in which they live, or may be found, to give their immediate attendance on this Assembly, to assign the reasons and grounds of the aforesaid judgment."

The five judges appeared and Judge Howell defended the opinion of the Bench in an able argument upon the unconstitutionality of the Acts, and asserted the independence of the court; contending that the Supreme Judiciary of the State were not accountable to the General Assembly or to any other power on earth, for their judgments. The Assembly "Resolved that no satisfactory reasons had been rendered by the judges for their judgment; but as there was no ground for impeachment, discharged them from further attendance upon this business." The next year, four of the five judges were removed from office by the assembly.[2]

In 1805, in the then back-woods of Ohio, a judge who believed the law of the constitution must be observed by the legislature as well as by every one else, held an act of the legislature unconstitutional and void.

The legislature of Ohio had passed an act giving jurisdiction to justices of the peace, without a trial by jury, and Judge Calvin Pease of the third judicial circuit, held the act unconstitutional and therefore void.

The decision created an excitement which took a political turn, especially among members of the legislature who had passed the act, and who professed to think that the judge had not only exceeded his judicial power, but had unjustly cast a damaging reflection on the wisdom of the legislature. The case was taken to the Supreme Court, where the decision of Judge Pease was affirmed.

This unexpected result so angered the agitators that they caused Judge Pease and Judge Todd of the Supreme court to be impeached. Believing that the doctrine maintained by the legislature—that the judiciary have no right to determine the unconstitutionality of a law —would be fatal to liberty, by rendering the law-making power an unlimited one, Lewis Cass, the friend of Jefferson, the co-laborer

[2]This account of the proceedings in Trevett v. Weeden is from Arnold's History of Rhode Island.

of Andrew Jackson, the man who always advocated the supremacy of the people, volunteered to defend the judges.

The trial lasted many days. The judges were acquitted, and this dangerous heresy of the omnipotence of the legislature, soon disappeared. But during the progress of the discussions arising out of the matter, there was great agitation in the State; and at one time, the prospects were alarming. The legislature retained some of the ablest and oldest lawyers in the State. Mr. Cass brought to the case great legal research and industry. His argument was unanswerable, and carried conviction to the minds of his hearers.

To day we are threshing over again the old straw of a hundred years ago.

To hear some persons talk, and to read some late writings, a person not familiar with the history of the country would get the opinion that it is necessary—to get back the government of the fathers—to take from the court the power to declare unconstitutional legislation, null and void. Lewis Cass was in public life for fifty years, and he never swerved from what he considered the rights of the sovereign people, and one hundred and seven years ago he could see that the rights of a free people cannot be safeguarded without a free and independent judiciary. He volunteered his services in behalf of his country in the war with England in 1812; he volunteered his services in behalf of the judges of Ohio who were being impeached for doing their duty, and were he here today, he would again volunteer his services in behalf of the maintenance of the same judicial independence he fought for in Ohio in 1805.

And yet there are people who imagine they have discovered a new thing in the "judicial veto" and that it must be prevented at once or it may cause untold damage to liberty. If such people would study history a little more and talk less, they would learn that the thing they have just discovered has been the law in this country, one hundred and twenty-six years, and that modern demagogues are not the first to have raised the issue against it as a political bugaboo. It was fought out in Rhode Island before the Federal Constitution was framed, and before John Marshall was upon the bench; it was argued repeatedly upon public occasions at the beginning of last century; it was fought out in Ohio over a hundred years ago, and was so well settled a question when Michigan was admitted to the Union, that no one even thought to the contrary, until socialists brought up the matter and demanded the abolition of the "judicial veto" in order to further their scheme of contemplated destruction of government and of rights in property.

And now, many people believe that the courts should be crippled

in their powers, forgetting that the day may not be far distant when they may want the court in protecting them, to have more vigor than a helpless cripple. Is it wise to throw away the great government safeguard of a century, just when you are most likely to need it?

Hugh S. Legaré, Attorney General of the United States in 1841, in writing of the democracy of Athens, concluded his article with the following words:

> "We will only say, in conclusion, that, if every American, who looks upon the picture we have presented of the so-called democracy of Athens, feels, as he must, a still deeper and more fervent gratitude to heaven, for having cast his lot in this most blessed of all lands, where perfect liberty has hitherto been found united with the dominion of the law and the reign of order, let him be penetrated with the conviction, that he owes it to the institutions of our fathers as they were originally conceived. Let him be assured that their glorious work needs no reforming, and that the base flatterers of the sovereign people, who preach to them of their infallibility, are here, what they ever have been, the ambitious, the vain, the unprincipled, the aspiring, who would bow down and worship any other power that could promote their own. History is written in vain, if mankind have not been taught that demagogue and tyrant are synonymous; and that he who professes to be the friend of the people, while he persuades them to sacrifice their reason to their passions—their duty to their caprices—their laws, their constitution, their glory, their integrity, to the mere lust of tyrannical misrule—is a liar, and the truth is not in him."

HOWARD WIEST.

LANSING, MICHIGAN.